

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

**BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON**

**RAYBURN D. SOUTH,
and HAROLD E. COLBURN,
JR.,**

Appellants,

v.

**STATE OF WASHINGTON,
DEPARTMENT OF NATURAL
RESOURCES,**

Respondent.

FPAB NO. 94-1

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

This matter came on before the Honorable William A. Harrison, Administrative Appeals Judge, presiding.

Appearances were as follows:

1. Mr. Rayburn D. South and Mr. Harold E. Colburn, Jr., landowners, pro se.

2. Mr. John E. Justice, Assistant Attorney General, Department of Natural Resources.

The hearing was conducted on March 9, 1994, in Spokane, Washington.

Caryn E. Winters, C.W. Court Reporting, Spokane, Washington, provided court reporting services.

Witnesses were sworn and testified Exhibits were examined. Board members Norman L. Winn, Chairman, Dr. Martin R. Kaatz, and Robert E. Quoidbach, have reviewed the record. From testimony heard and exhibits examined, the Forest Practices Appeals Board makes these

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
FPAB NO. 94-1**

2 **FINDINGS OF FACT**

3 **I**

4 This matter concerns 35 acres of timber in Pend Oreille County. Appellant, Rayburn
5 D. South purchased the property in 1992 with the intent of logging and developing it.
6 Appellant Harold E. Colburn, Jr., is co-owner of the property.

7 **II**

8 On March 12, 1993, Mr. South filed a forest practices application with respondent, the
9 Washington State Department of Natural Resources (DNR), for approval to log the property.
10 That application stated that there were no wetlands of any type on the site. The application
11 was approved by DNR. A condition of the application nevertheless required a "wetland
12 management zone" (WMZ) of 50 feet minimum width (100 feet average width) around any
13 wetland found to exist.

14 **III**

15 The site in question did contain a wetland. By its lack of "crown closure" (overhead
16 tree coverage) the wetland is of the non-forested type. It is surrounded by trees. The extent
17 of the wetland on the site is approximately 5 acres, although it is contiguous with wetland on
18 the neighboring site. Extensive open water on the neighboring site sustains the estimate of the
19 state's wetland expert that standing, open water of 1/2 acre exists on the site for at least 7 days
20 per year. The presence of reed canary grass and other wetland vegetation, coupled with the
21 opening which it created in the forest was sufficient to indicate the character of the 5 acres as
22 wetland. Wetlands do not generally appear on DNR water typing maps, and did not appear on
23 the water typing map for this site. Even so, the vegetation reveals the presence of a wetland.

IV

Forest practices rules requiring maps for water (stream) typing are distinct from the rules for typing wetlands. Compare WAC 222-16-030 with WAC 222-16-035. Under wetland typing rules approximate determination of wetlands may be made by using "aerial photographs and maps" WAC 222-16-035. The rule does not restrict wetland typing to water type maps, and does not prevent identification of wetlands through observation by either the operator or DNR. Wetlands need not be pre-marked on the ground, except in cases where roads would fill the wetland (as opposed to entering the WMZ). WAC 222-16-035 and Forest Practices Manual (8) "Approaches", p. M-39. Under this system, wetlands and WMZ's exist where a wetland exists in fact. This is so even if the wetlands are unmarked on water typing maps, and not flagged on the ground by DNR prior to operations.

V

Logging was commenced in the spring while snow was on the ground. The snow did not conceal the vegetation which revealed the presence of a wetland.

VI

A skid road was built by use of heavy equipment within the 50 foot minimum border or WMZ around the wetland. This extended some 300-400 feet within the WMZ.

VII

Trees were harvested in the WMZ. Larger trees exceeding 12" in diameter were cut without leaving the minimum of 25 per acre in the WMZ.

VIII

On May 12, 1993, in response to a complaint concerning logging near wetlands, the DNR forester visited the site. That forester, Bob Hartley, issued a stop work order to

1
2 Mr. South. It cited operations in the WMZ in violation of WAC 222-30-020(7) of forest
3 practices operations. A field conference was held in which a new application was required.
4 Notes of the conference made by Mr. Hartley, the DNR forester, show that a "proposed road
5 across wetlands" was discussed. Mr. South contends that while Mr. Hartley's written notes
6 show discussion of such a road, Mr. Hartley also orally authorized the road across wetlands.

7 IX

8 Mr. South did file a new forest practices application a few days after the stop work
9 order. The second application is dated May 17, 1993. It provides in the "General Description"
10 section that "Access will not be through wetlands but through neighboring properties."

11 X

12 Thereafter Mr. South, upon being denied access by his neighbors, constructed a road
13 through the wetland on the site. Heavy equipment was used to build the road. Mr. Hartley of
14 DNR responded with a notice dated October 28, 1993, citing the road as a deviation from the
15 May 17, 1993, application.

16 XI

17 A civil penalty of \$1,100 was assessed against Mr. South by DNR on November 10,
18 1993. The penalty cited violation of WAC 222-30-020(7)(b) which requires 25 trees of
19 greater than 12" diameter to be left in a WMZ. The penalty cited violation of WAC 222-30-
20 020(7)(e) which bans equipment usage in a WMZ. It also cited an excess volume of harvest
21 relative to the 40% cut allowed by the approved application.

22 XII

23 The penalty amounts were computed as \$400 base penalty for each WMZ violation and
24 \$50 base penalty for the volume of harvest violation. Each base penalty (\$400-\$400-\$50) was
25 doubled due to a higher level of damage to public resources but without any factor for lack of

2 cooperation on the part of Mr. Smith or his co-owner Mr. Colburn. Both men were spared
3 any increase in penalty due to the factor known as "prior knowledge" as both were new to
4 logging in Washington. The base of \$400 doubled to \$800 was reduced to \$500, the daily
5 maximum. Two such penalties totaled \$1,000. The doubled \$50, or \$100, was withdrawn by
6 DNR upon a request for relief from penalty by Mr. South. The \$1,000 remains at issue here.

7 XIII

8 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.
9 From these Findings of Fact, the Board issues these:

10 CONCLUSIONS OF LAW

11 I

12 The site contains a Class A wetland. Such a wetland is defined at WAC 222-16-035(1)
13 as.

14 1) "Nonforested wetlands" means any wetland or portion
15 thereof that has, or if the trees were mature would have, a crown
16 closure of less than 30 percent."

17 (a) "Type A Wetland" classification shall be applied to all
18 nonforested wetlands which:

- 19 (i) Are greater than 0.5 acre in size, including any
20 acreage of open water where the water is completely
21 surrounded by the wetland; and
- 22 (ii) Are associated with at least 0.5 acre of ponded or
23 standing open water. The open water must be present on
24 the site for at least 7 consecutive days between April 1
25 and October 1 to be considered for the purposes of these
26 rules, or
- 27 (iii) Are bogs and fens greater than 0.25 acre.

28 It is ultimately the responsibility of the forest practices applicant to locate wetlands and
29 disclose them in the application

II

Within a wetland management zone (WMZ), WAC 222-30-020(7)(b) requires:

Within the WMZ, leave a total of 75 trees per acre of WMZ greater than 6 inches dbh in Western Washington and greater than 4 inches dbh in Eastern Washington, 25 of which shall be greater than 12 inches dbh including 5 trees greater than 20 inches dbh, where they exist. Leave trees shall be representative of the species found within the WMZ

Appellants violated WAC 222-30-020(7)(b) by cutting trees greater than the 12" dbh in the WMZ while not leaving a minimum of 25 such trees per acre.

III

Within a wetland management zone (WMZ), WAC 222-30-020(7)(e) requires:

Tractors, wheeled skidders, or other ground based harvesting systems shall not be used within the minimum WMZ width without written approval of the department. (Emphasis added.)

Mr. Hartley did discuss a wetland road. It is contested whether he orally authorized such a road. Yet under the foregoing regulation an authorization, to be valid, must be in writing. Cognizant of the difficulties which may follow from varied recollections of an oral conversation, the rule allows equipment to operate within a WMZ only with written authorization from DNR. No such written authorization is in evidence. All written evidence is consistent with the denial of such authorization. By using the equipment necessary to build

1 the skid road in the WMZ as well as a road across the wetland, appellants violated WAC 222-
2 30-020(7)(e).
3

4 IV

5 The amount of penalty at times pertinent to this matter was \$500 per day. That
6 maximum operates in appellant's favor. Had DNR's assessment of wetland damage been
7 within legal limits, the penalty would have been higher. The legal limit has since been raised
8 to \$10,000 per day which appellant should note for the future.
9

10 While DNR did not fault appellants' cooperation, that position was generous. All
11 written evidence, including the most recent approved application, renounced the building of a
12 road in wetlands while such a road was built anyway.
13

14 The civil penalty of \$1,000 assessed in the matter was justified.

15 V

16 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
17 From the foregoing, the Board issues this:
18

ORDER

The \$1,000 civil penalty is sustained.

DONE at Lacey, WA this 14th day of April, 1994.

William A. Harrison

HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

FOREST PRACTICES APPEALS BOARD

Norman L. Winn

NORMAN L. WINN, Chairman

Martin R. Kaatz

DR. MARTIN R. KAATZ, Member

Robert E. Quoidbach

ROBERT E. QUOIDBACH, Member

F94-1F

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
FPAB NO. 94-1